VERMONT LABOR RELATIONS BOARD

NORTH COUNTRY EDUCATION ASSOCIATION	)	
v.	)	DOCKET NO. 82-14
BOARD OF SCHOOL DIRECTORS OF NORTH COUNTRY SCHOOL DISTRICT	)	

FINDINGS OF FACT, OPINION, AND ORDER

On February 26, 1982, the North Country Education Association ("NCEA"), by and through its representative, the Vermont Education Association ("VEA"), filed an unfair labor practice charge against the Board of School Directors of the North Country School District ("School Board"). NCEA alleged the School Board violated 21 VSA §1726(a)(1)(2) and (5) by unilaterally changing the teachers' workday, by revoking its agreement to submit the workday dispute to binding arbitration, and in that the letter of one of its agents sent to teachers during the course of negotiations, referencing the firing and decertification of 12,000 Federal employees, was designed to coerce NCEA into a more favorable settlement.

The School Board responded to the charge on March 10, 1982. On March 19, 1982, the Vermont Labor Relations Board issued an unfair labor practice complaint on the grounds the School Board may have committed an unfair labor practice in violation of 21 VSA §1726(a)(1) and (5) by failing to proceed to arbitration on a dispute arising after the termination date of the 197-81 collective bargaining agreement but before the School Board was permitted to make unilateral changes in conditions of employment pursuant to 16 VSA §2008. The Board declined to issue a complaint on the other NCEA allegations.

A hearing was held before the full Board on September 16, 1982, at the Board hearing room in Montpelier. NCEA was represented by VEA General Counsel James S. Suskin. The School Board was represented by its attorney, Duncan F. Kilmartin. At the hearing, the parties stipulated to the admission of exhibits attached to the NCEA charge, School Board answer to the charge, and a June 8, 1982, letter from Duncan Kilmartin to the Labor Relations Board.

Proposed Findings of Fact and Memoranda of Law were filed by the School Board and NCEA on September 27 and 28, 1982, respectively.

FINDINGS OF FACT

1. NCEA is the exclusive bargaining representative for all teachers employed by the North Country Union High School District. The School Board is the governing body of the comprehensive regional Union High School District. Eleven town districts are included within the School District.

2. The NCEA and the School Board had entered into a collective bargaining agreement for two years, effective July 1, 1979, and expiring July 1, 1981 ("1979-81 Agreement").

3. The 1979-81 Agreement contained the following provisions:

> Article II, Section 1
>
> On or before October 1, the Association and/or the Board shall notify the other if they intend to negotiate new proposals or modify the present agreement.
>
> Article XXII, Section 2
>
> Grievance Defined: Any claim that a condition exists which adversely affects the welfare and/or terms and conditions of employment of a teacher or group of teachers, based on a violation, misinterpretation, or misapplication of the terms of this Agreement.

Article XXX

> The Agreement shall be effective as of July 1, 1979, and shall continue in full force and effect for a two-year period until twelve (12:00) midnight, June 30, 1981, and from year to year thereafter, unless written notice is issued per Article II.

4. NCEA gave timely notice of its intent to bargain a successor agreement to the 1979-81 Agreement. Bargaining ensued in the Fall of 1980, and impasse was declared in December, 1980.

5. In early 1981, the parties, with the assistance of a mediator, made progress, but failed to reach a full agreement. One of the items in dispute and agreed upon was the grievance procedure. The School Board wanted to change the time periods involved in the grievance procedure, which the Association agreed to. No other changes were proposed in the grievance procedure.

6. The 1979-81 Agreement contained an arbitration clause which provided for submission of unresolved grievances to final and binding arbitration. Article XXII, Sections 4-5. In negotiations for the successor agreement, neither party proposed to change the arbitration clause.

7. The length of the teachers' workday was not a subject of dispute in negotiations for a successor agreement.

8. Subsequent to the unsuccessful mediation, the parties agreed to submit their remaining disputes to a fact-finding committee which met on September 8 and 29, 1981, and issued a report dated November 10, 1981. The grievance procedure, arbitration, and length of the workday were not issues in dispute at fact-finding.

9. On August 12, 1981, North Country Union High School Principal Noel Ford notified all teachers of a change in their workday; that the

junior high school staff would be working from 8:30 a.m. to 3:10 p.m. and the senior high school teachers would be working from 8:00 a.m. to 2:30 p.m. Prior to the change, it had been the practice that teachers were allowed to arrive prior to first class and leave after their last class. For some teachers, the change in the workday meant as much as 1 1/2 additional work hours.

10. Article VI, Section 2 of the 1979-81 Agreement provided:

> The Association and its members recognize that each teacher has a professional responsibility to provide, to the best of his ability, maximum opportunity to every student and that this responsibility entails faithful and punctual discharge of teachers' duties and assignments throughout a full day; full in the professional sense of early arrival at school, punctual attendance at all assigned classes for each of which full preparation has been made, and departure from school only after the daily needs of all assigned students have been met. Failure in this regard will invite administrative redress, subject to the Grievance and Arbitration Procedures of this Agreement.

11. On August 31, 1981, the new workday went into effect. On September 4, 1981, NCEA filed a grievance "on behalf of the teachers at the High School and Junior High School" over the "administration's decision to unilaterally change the length of the workday". The grievance alleged the change violated, among other provisions, Article VI, Section 2 of the 1979-81 Agreement. On September 4, 1981, Ford responded to the grievance by stating there was a "substantial question" whether the 1979-81 Agreement had any "current validity and application"; but even assuming it did, NCEA "failed to state sufficient facts which, if true, constitute a grievable matter."

12. On September 10, 1981, NCEA appealed the grievance to Superintende Forbush, the Step III level of the grievance procedure. Forbush, assuming

the provisions of the 1979-81 Agreement had validity, denied the grievance on September 22, 1981, concluding NCEA had "not stated sufficient evidence to substantiate a grievance in the matter."

13. On September 28, 1981, NCEA appealed the grievance to Step IV, the School Board level. A hearing was scheduled for October 20, 1981. Prior to the hearing, Byron Fish, Negotiations and Grievance Committees Chair, sent a flyer to all junior and senior high school teachers urging them to attend the October 20 hearing because "we need your support ...we must let the Board know we are united on issues of negotiations and contract violations". The hearing was held October 20. At the hearing the School Board requested that the teachers filing the grievance be specifically identified. NCEA refused. On October 21, 1981, the School Board denied the grievance, concluding the NCEA "failed to state sufficient facts which, if true, constitute a grievable matter."

14. On November 23, 1981, NCEA notified the School Board they were submitting the grievance to final and binding arbitration. On December 1, 1981, Duncan Kilmartin, on behalf of the School Board, notified NCEA representative Allen Stook that the School Board did not "recognize NCEA's demand for arbitration", citing among other reasons that the 1979-81 Agreement had no current validity because it had expired June 30, 1981, and even if the Agreement did have validity, the grievance was non-arbitrable under the provisions of the Agreement. Kilmartin stated the Board would not agree to arbitration, and suggested two alternatives open to NCEA:

> You can seek relief from the Courts to compel the Board of School Directors to submit to arbitration or, assuming that a contract is entered into and made retroactive to July 1, 1981,

between NCEA and the School Board, a teacher or group of teachers who are aggrieved may then seek to utilize the grievance procedure, if any, contained in the collective bargaining agreement.

15. Subsequent to release of the fact-finding committee's November 10, 1981, recommendations on matters in dispute in negotiations, the negotiating teams for NCEA and the School Board tentatively accepted the recommendations. Subsequently, the teachers met and accepted the fact-finding committee's recommendations. At this meeting, the teachers did not formally ratify the successor agreement, taking the position they would not do so until all the individual districts of the School District ratified it. If one of the individual towns did not ratify the Agreement, NCEA could have rejected it. However, all individual town districts ratified the Agreement; and on December 18, 1981, NCEA gave the successor Agreement final ratification.

16. The new Agreement was a two-year pact, and was effective "as of July 1, 1981" (Article XXIX of the July 1, 1981-June 30, 1983 Agreement). The Agreement contained the identical language of Article VI, Section 2 of the 1979-81 Agreement, and contained the identical arbitration clause of the 1979-81 Agreement.

17. On December 21, 1981, NCEA submitted the workday grievance to the American Arbitration Association (AAA), requesting arbitration. On December 31, 1981, Kilmartin informed the AAA the School Board would not participate in any arbitration proceedings. As reasons, Kilmartin referred the AAA to his December 1, 1981, letter to Allen Stook, and stated the School Board was exercising its common law right, recognized in Fairchild v. Rutland School District, 135 Vt. 282 (1977), to revoke arbitration.

18. On February 8, 1982, Richard Reilly, AAA Regional Director, informed Stook and Kilmartin that, in light of Fairchild, the AAA did not believe it had proper jurisdiction to proceed.

19. The change in workday instituted on August 31, 1981, is still in effect, and the parties did not address the issue in the course of negotiations after the change was instituted.

OPINION

At issue is whether the School Board committed an unfair labor practice in violation of 21 VSA §1726(a)(1) and (5) by failing to proceed to arbitration on a dispute arising after the termination date of the 1979-81 collective bargaining agreement but before the School Board was permitted to make unilateral changes in conditions of employment pursuant to 16 VSA §2008.

The parties commenced negotiations in Fall 1980 for a successor contract to the existing one which was to expire June 30, 1981. Neither party proposed to change the arbitration clause of the contract, and it was never an issue in dispute during negotiations. Other disputed issues resulted in an impasse. The parties used the services of a mediator but failed to resolve all their outstanding differences. The parties submitted their remaining disputes to a fact-finding committee which issued a report on November 10, 1981. The parties accepted the fact-finding committee's recommendations and the contract was finally ratified on December 18, 1981.

On August 31, 1981, a unilateral change in the teachers' workday described in Finding 9 had been put into effect by management. The NCEA filed a grievance over the change. The grievance was denied at the first

three steps of the grievance procedure on the basis that there was a question whether the provisions of the 1979-81 Agreement had current validity and application and because NCEA failed to state sufficient facts which constitute a grievable matter. On November 23, 1981, NCEA notified the School Board they were submitting the grievance to final and binding arbitration. The School Board subsequently revoked arbitration. There is a question when this occurred. The School Board argues this did not occur until December 31, 1981, after the successor contract had been signed, when the School Board's attorney Duncan Kilmartin informed the American Arbitration Association the Board would not participate in any arbitration proceedings. However, we find the revocation effectively occurred earlier, on December 1, 1981, when Kilmartin informed the NCEA that the School Board did not "recognize NCEA's demand for arbitration", and would not agree to it, citing among other reasons that the 1979-81 Agreement had no current validity because it had expired June 30, 1981. Thus, the refusal to arbitrate occurred during the hiatus between the two contracts at the most sensitive period of bargaining.

The principal issue then is whether the parties were required to use the arbitration procedure to settle this grievance even though the grievance was initiated during the hiatus between the two contracts. This particular issue is one we have not directly addressed in past decisions, and believe it is appropriate to look to federal decisions and decisions of other states, under parallel legislation, to guide us. In re Southwestern Vermont Education Association and Mount Anthony Union High School Board, 136 Vt. 490 (1978).

The National Labor Relations Board has held that an employer's refusal to arbitrate a grievance which arose after the expiration of a collective bargaining agreement containing an arbitration provision does not violate Section 8(a)(5) of the Labor Management Relations Act. 29 U.S.C. 158(a)(5). That is because arbitration is a "consensual surrender of the economic power which the parties are otherwise free to utilize" and that consensual surrender is contractually premised. Arbitration is said to be a creature of the contract. If the contract expires, the arbitration commitment expires. Hilton-Davis Chemical Co., 185 NLRB 241 (1970). S&W Motor Lines, Inc. and Teamsters Local Union No. 391, 236 NLRB 938 (1978). However, if there is an agreement to extend a contract containing an arbitration provision, it necessarily follows that the obligation to arbitrate remains, and the elimination of arbitration is a violation of Section 8(a)(5) of the Act. Taft Broadcasting Co. v. NLRB, 441 F2d 1382 (8th Circuit, 1971).

Section 8(a)(5) of the National Act makes it an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees. This provision is substantively the same as 21 VSA §1726(a)(5), which makes it an unfair labor practice for an employer to refuse to bargain collectively in good faith with the exclusive bargaining agent.

The New York Public Employment Relations Board has found the unilateral withdrawal by the employer of the previously enjoyed benefit of binding arbitration of grievances, while the parties were negotiating a successor contract to one that had recently expired, constituted refusal to bargain in good faith, where the parties had not proposed to amend the arbitration

provisions of the previous contract and had agreed that all terms in the previous contract would remain the same unless there was a request to modify them. Board of Education of Malone Central School District and Malone Central Teachers' Association, 8 PERB 3043 (1975). Where the parties had not so agreed, the Board held the employer was not obligated to permit unresolved grievances to proceed to arbitration. Port Chester-Rye Union Free School District and Port Chester Teachers' Association, 10 PERB 3079 (1977).

Thus, whether the parties agreed to extend the arbitration provision is central to determining whether the arbitration procedure is effective during the hiatus between contracts. We think Caribou Board of Education v. Caribou Teachers' Association, Supreme Judicial Court of Maine, 402 A2d 1287 (1979) a wise precedent. In Caribou, as here, the parties proposed no changes in the arbitration procedure. In Caribou, however, a negotiation ground rule provided that if no changes in the articles of the preceding contract were proposed, those articles would be carried over into the successor contract. In Caribou the arbitration procedure was held effective during the hiatus between the two contracts.

Here, there was no stipulation or ground rule expressly providing that if no change was proposed regarding provisions of the preceding contract, those provisions would carry over into the successor contract. However, this does not mean the parties did not intend the arbitration clause to continue in effect. The fact that the arbitration provision was never in dispute makes this case indistinguishable from Caribou. We believe that whenever parties commence bargaining and no proposal is offered to change the arbitration procedure, then there is a tacit

agreement by the parties that the arbitration procedure survives expiration of the contact during the hiatus. cf. Bouchard v. City of Rochester, Supreme Court of New Hampshire, 409 A2d 772 (1979)(fair hearing provision for dismissed employee did not survive expiration of agreement where agreement expired a year earlier and there was no indication the parties intended the hearing provision to survive the expiration of the contract).

Our holding is buttressed by the views of the U.S. Supreme Court. In Nolde Brothers v. Bakery Workers, 430 U.S. 243 (1977), the Court reinforced its policy that arbitration is the preferred way to resolve disputes, and held that the arbitration clause of a contract survives contract termination unless the parties indicate a contrary intent, either "expressly or by clear implication". Id, at 255. See also United Steelworkers of America, AFL-CIO v. Fort Pitt Steel Casting Division Conval-Penn, Inc., (3rd Circuit, 1980) 635 F2d 1071, Federated Metals Corp. v. United Steelworkers of America (AFL-CIO), (3rd Circuit, 1981) 648 F2d 856.

Here the parties did not indicate in any way that arbitration would not survive contract termination. Nonetheless, the School Board contends Vermont law does not express such strong support for arbitration, citing dicta in Fairchild v. West Rutland School District, 135 Vt. 282 (1977), for the proposition that parties have the common law right to revoke arbitation at any time. Even if Fairchild , dicta , is good law, it is distinguishable from this case. In Fairchild, the issue before the Vermont Supreme Court was whether the issue was arbitrable, not whether an arbitration procedure existed at all. Indeed, the Vermont Supreme Court, like the U.S. Supreme Court, has expressed a stong preference for arbitration as

"a reasonably amicable method of resolving disputes in the least expensive and most expeditious manner possible". Morton v. Essex Town School District, 140 Vt. 345, at 349 (1981).

In Morton, where the contract provided for binding grievance arbitration, the Court added:

> This Court has repeatedly supported the right of a teacher to pursue, through bargained for grievance procedures, arbitration of any claim of breach of contract in lieu of an action at law. Bellows Falls Union High School District No. 27 v. Rodia, 139 Vt. 262, 428 A2d. 1094 (1981); Brattleboro Union High School, supra; Fairchild v. West Rutland School District, 135 Vt. 282, 376 A2d 28 (1977); Danville School Directors, supra. Id, at 349.

We conclude arbitration has a preferred place in Vermont as the U.S. Supreme Court has found in the private sector, and believe our reliance on federal precedent is not unwarranted. We concur completely in the analysis of this problem found in Goetz, Arbitration After Termination of Collective Bargaining Agreement, 63 Va. L. R. 683 (1977). All the reasoning in that article supports our holding here, that arbitratio is a key ingredient in fostering labor peace, and is to be strongly supported. Moreover, we find especially persuasive the discussion critical of National Labor Relations Board decisions finding no unfair practices in this context.

Given the strong preference for arbitration as a policy matter and our obligation to ensure bargaining is done in good faith, we believe it is the antithesis of good faith to do what the School Board did here. It impliedly agreed to submit unresolved grievances to binding arbitration and then later refused to recognize the validity of the arbitration procedure. We conclude the School Board refused to bargain in good faith in violation of 21 VSA §1726(a)(5) by leading the NCEA to believe the arbitration clause was applicable, and then later claiming it had no applicability.

By this decision, we do not need to hold the duty to arbitrate grievances automatically continues beyond the expiration of the contract if the parties have not completed mandated statutory impasse procedures pursuant to our decisions in Chester Education Association v. Chester-Andover School Board of Directors, 1 VLRB 426 (1978), and Rutland School Board v. Rutland Education Association, 2 VLRB 250 (1979). We need not reach that issue in this case, because we find an implied agreement in the bargaining history to arbitrate grievances during the hiatus. Still, it is not altogether clear these principles are inapplicable; but given the wariness with which courts approach agreements to arbitrate, we prefer to rest our decision on actual consent since that is as far as this case requires us to go.

We have a remaining issue before us; that of arbitrability. Besides its claim the arbitration clause was not effective, the School Board further contends the subject matter of this grievance, the change in workday, is not arbitrable, and we do not have authority to resolve the arbitrability issue. We recognize that our jurisdiction is limited to what is conferred by statute. In re Grievance of Guttman and Minaert, 139 Vt. 574 (1981). We have further recognized our jurisdiction does not extend to determining arbitrability of grievances involving teachers and school boards. Union District 32 High School Association AFT Local 3333, and Jethro Danzinger v. Union District 32 Board of School Directors, 4 VLRB 254 (1981). The question of arbitrability of a specific claim under a valid general agreement to arbitrate is a question for arbitrators and, ultimately, the courts. Fairchild v. West Rutland School District, supra.

However, we believe it is appropriate to determine whether this grievance is "arguably arbitrable." That is, whether it is an unfair labor practice to unilaterally refuse to arbitrate a hiatus grievance while bargaining is on-going. In Nolde, supra, the U.S. Supreme Court reinforced its holding in John Wiley & Sons v. Livingston, 376 U.S. 543 (1964) in determining "that the parties' obligations under their arbitratic clause survived contract termination when the dispute was over an obligatic arguably created by the expired agreement". Nolde, at 252. It is true that as in Nolde the Association could have sought court review of the Board's refusal to arbitrate, but as we have said, that refusal could also constitute an unfair labor practice. We conclude that a dispute which is "arguably arbitrable" would fall in this category.

The School Board contends state law excludes the length of the workday from the subjects about which school boards must bargain pursuant to 16 VSA §2004, citing 16 VSA §1071(a). §1071(a) provides the "school board shall fix the number of hours that shall constitute a school day." We do not believe this provision makes the actual hours of in-school work by teachers non-negotiable. The length of the schoolday as set, while it affects the number of hours teachers must work, does not establish their working hours. The school may have to be in operation a certain number of hours, but teachers may work less than those hours, or above and beyond those hours, or outside those hours. Length of the workday is a mandatory subject of bargaining pursuant to 16 VSA §2004 because it is a "related economic condition of employment" to salary; salary being established dependent partly on the number of hours a teacher works.

Moreover, the workday dispute is arguably covered by the provisions of the expired agreement since Article VI, Section 2, describes what constitutes a "full day" (See Finding 10), and like the arbitration clause, a contract provision regarding workdays survived the expiration of the contract. See Chester, supra. Nonetheless, the School Board contends this grievance is not arbitrable because the contract does not allow "class action" grievances, and this grievance was filed on behalf of all the teachers at the High School and Junior High School. While we will not decide whether the contract does cover such disputes, we find it arguably does since Article XXII, Section 2, allows grievances to be filed on behalf of a "group of teachers" (See Finding 3).

We conclude the workday grievance is arguably arbitrable, and, contrary to the School Board's contentions, this issue is not moot. Bargaining left this matter in abeyance such that the arbitrator, based on past practice, could restore the former workday since the language concerning workday in the 1979-81 contract and its successor is identical. Moreover, this is the type of case which is "capable of repetition yet evading review". In re. J. S. Juvenile, 139 Vt. 6 (1980). Board of School Commissioners of Rutland v. Rutland Education Association, 2 VLRB 250 (1978).

The remaining issue is what "affirmative action" we should order to remedy the unfair labor practice pursuant to 21 VSA §1727(d). We note that the revocation to arbitrate occurred during a period the School Board was required to bargain in good faith. We clearly have the authority to order it to bargain in good faith; and in a case like this we believe it appropriate to remedy the revocation by ordering the School Board to

submit the workday grievance to arbitration. By this action, we are not saying the grievance is arbitrable; that is, for the arbitrator and, ultimately, the courts to decide. Fairchild, supra. Goetz, Arbitration After Termination of Collective Bargaining Agreement, 63 Va. L. R. 683 (1977).

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED that the Respondent Board of School Directors of North Country School District shall:

1. Cease and desist from refusing to negotiate in good faith with the North Country Education Association by maintaining the arbitration clause of the July 1, 1979 - June 30, 1981, collective bargaining agreement is inapplicable to the grievance filed by the Association regarding the change in the length of teachers' workday; and

2. Take the affirmative action of submitting the workday grievance to arbitration pursuant to the arbitration clause of the 1979-81 Agreement.

Dated this 3rd day of December, 1982, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD.

Kimberly B. Cheney, Chairman

William G. Kemsley, Sr.

James S. Gilson